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Veigh Cummings and JoEllen Cummings v. J. Elmo England, DeLoyd England and Boyd England : Brief of Respondents

Utah Supreme Court

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Robert B. Hansen; Attorney for Defendants and Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

VEIGH CUMMINGS and JoELLEN CUMMINGS, his wife,
Plaintiffs and Appellants,

—vs.—

J. ELMO ENGLAND, DeLOYD ENGLAND, AND BOYD ENGLAND, A partnership, doing business under the name and style of ENGLAND BROTHERS,
Defendants and Respondents.

No. 9344

BRIEF OF RESPONDENTS

ROBERT B. HANSEN
Attorney for Defendants and Respondents

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AUTHORITIES CITED

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STATEMENT OF FACTS

The facts set forth in opponents' brief are incomplete. For this reason, respondents believe it would be helpful to set forth a chronological statement of the occurrences here in question.

In the month of March, 1958 (Exhibit 28-D), the plaintiff, VEIGH CUMMINGS, on behalf of appellants, and J. ELMO ENGLAND, on behalf of respondents, began efforts to consummate an arrangement concerning a ranch located in Summit County which the respondents were purchasing from Vern Mills and Kenneth Mills under a uniform real estate contract dated October 1, 1948 (Exhibit 5-P), but the agreement, which is the subject matter of this lawsuit and which was prepared by Earl M. Marshall, Attorney and Judge of Tooele City, was not executed until May 7, 1958 (R. 214 and Exhibit 7-P). It should be noted that Mr. Cummings' contract, however, had the date of March 26, 1958, filled in although no one seemed to know who had done this (Exhibit 6-P, R. 108, R. 214). At the time the agreements were signed, Mr. Cummings had sheep as well as cattle on the premises but promised to remove them shortly (R. 94, R. 115, R. 135, R. 136). Mr. Cummings did not remove the sheep from the premises, however (R. 136), and, as might be expected, a conflict concerning the use of the two types of livestock developed (R. 93). This conflict resulted in Mr. Marshall advising Mr. Cummings by letted dated October 8, 1958, that Mr. England was exercising his option to pay off the sum that Mr. Cummings had in the subject ranch property and was ready and willing to pay this sum at the earliest date provided by the terms of the agreement (Exhibit 1-P). One of the terms of the subject contract (Exhibit 7-P) provides for a mutual option to buy each other out "after 12 months from the date of execution" (page 3).

On November 19, 1958, respondents exercised their option to terminate appellants' interest in the contract for failure of appellants to make the payment required of them on October 1, 1958, or withinn the 30-day grace period. (Exhibit 2-P)

On April 28, 1959, the appellants attempted to exercise their option to buy out respondents' interest in the subject property (Exhibit 3-P). On May 14, 1959, the respondents exercised their option to buy out the appellants pursuant to the terms of Exhibit 7-P (Exhibits 4-P and 19-D). On June 26, 1959, the parties agreed to sell the property involved in this contract to the Cottonwood Stake of the Church of Jesus Christ of Latter-day Saints without prejudice to the rights of either side with respect to the proceeds resulting from an interim division made by the parties. (Exhibit 25-D)

On July 27, 1959, the property in question was sold to the Church for the sum of $75,000.00 (R. 66).

On September 11, 1959, respondents paid appellants their share of the property in accordance with the formula set forth in Exhibit 7-P. (Exhibit 20-D, R. 23).

STATEMENT OF POINTS

POINT 1.

DEFENDANTS MADE A VALID AND SUFFICIENT TENDER AND PAYMENT TO PLAINTIFFS TO PURCHASE THE INTEREST OF PLAINTIFFS IN THE SUBJECT PROPERTY.

POINT 2.

DEFENDANTS WERE LEGALLY ENTITLED TO PURCHASE THE INTEREST OF PLAINTIFFS PURSUANT TO THE OPTION TO DO SO IN THEIR CONTRACT AND THE GRANTING OF AN OPTION BY THE DEFENDANTS TO A THIRD PARTY TO PURCHASE THE ENTIRE INTEREST IN THE SUBJECT PROPERTY WOULD NOT EFFECT THIS RIGHT, PARTICULARLY UNDER THE FACTS OF THIS CASE.

POINT 3.

PLAINTIFFS FORFEITED THEIR INTEREST IN THE CONTRACT OF MAY 7, 1958, BY FAILING TO MAKE THE PAYMENT DUE THEREUNDER ON OCTOBER 1, 1958, OR WITHIN THE 30-DAY GRACE PERIOD THEREAFTER.

ARGUMENT

POINT 1.

DEFENDANTS MADE A VALID AND SUFFICIENT TENDER AND PAYMENT TO PLAINTIFFS TO PURCHASE

THE INTEREST OF PLAINTIFFS IN THE SUBJECT PROPERTY.

In the corresponding point of appellants' brief' it is contended that the sum paid by respondents on September 11, 1959, of $1,597.79 was the net payment to the Mills on the principal amount owing out of the down payment of $3,000.00. This is not correct and the proper amount found necessary to exercise the option was found by the court in its memorandum decision. (R. 23) Defendants to be on the safe side, of course, granted an extra credit in order to be sure to comply with the principle of law enunciated in the cases set forth on page 9 of appellants' brief. The real question on this point is whether or not the sum tendered must be the full amount of money necessary to exercise the option according to its terms or whether it must be this amount plus any other sum that may be due or thereafter found due to the tenderee by the tenderer for an obligation other than that arising out of the sum due to exercise the option. The Trial Court decided that the option in this case required only the payment of the formula set forth in the contract, which is Exhibit 7-P, and that the terms of the contract governed the sum which respondents were required to tender and pay to appellants. (R. 31, 32) None of the cases cited by appellants take the position that all accounts between the tenderer and tenderee must be paid or offered to be paid in order for a valid tender or exercise of an option to take place.

POINT 2.

DEFENDANTS WERE LEGALLY ENTITLED TO PURCHASE THE INTEREST OF PLAINTIFFS PURSUANT TO THE OPTION TO DO SO IN THEIR CONTRACT AND THE GRANTING OF AN OPTION BY THE DEFENDANTS TO A THIRD PARTY TO PURCHASE THE ENTIRE INTEREST IN THE SUBJECT PROPERTY WOULD NOT EFFECT THIS RIGHT, PARTICULARLY UNDER THE FACTS OF THIS CASE.

None of the authorities cited by appellants under this corresponding point are applicable to the facts of this case because in none of those cases had the tenants in common contracted for an option whereby either could buy out the other, as was true in this case. In addition, the Utah case of *Holland v. Morton* on which appellants rely heavily involved a case where the highest type of fiduciary relationship existed between the parties in which one was acting as the agent and attorney for the other. In this case, neither party was acting as agent for the other and the court expressly found that no fiduciary relationship existed between them (R. 22, 36).

In the absence of any fiduciary relationship existing between the parties, it is difficult to understand upon what theory appellants contend respondents had any duty to communicate to them any indications of an interest to purchase on behalf of third persons and of their response thereto, particularly when this occurred after a time when respondents would reasonably believe that the interest of the appellants had been forfeited by failure to make the payment due October 1, 1958, and the letter written by Attorney Marshall on their behalf several months before. At the very least, it should have been obvious to appellants from Exhibits 1-P and 2-P as early as the latter part of November, 1958, that respondents intended to acquire the entire interest in this property by purchase or forfeiture and could not expect to receive any communications that might effect their joint or several interests in this property.

Nowhere in the evidence is there any indication that the Church paid more than the fair price for the farm in question. It should have been as apparent to the appellants as to the respondents that the value of the property was greater at the time in question than the sum necessary to purchase it from the other party, especially when the appellants were in possession of the property and the respondents were not, so the failure of respondents to communicate a particular fact which indicated that such was the case could hardly have been detrimental.

In view of the fact that the option right was reciprocal, it is hardly to be expected that one party would communicate all offers to buy at a price in excess of the option price to the other in order to give the other a first opportunity to buy him out.

The wisdom of such provisions in a contract as the mutual option here might be questionable, but the party who comes off second best can hardly expect the court to re-write the contract for him by alleging that the results of the "earlier bird getting the worm" are unconscionable, unfair and unreasonable.

Equity cannot modify a contract or relieve a party thereto from contract's provision merely because contract has the effect of placing the party in a less desirable position than he formerly occupied. *Chikasaw Lumber Co. v. Kunkel,* 183 Okl. 347, 82 P.2d 1003.

It is difficult to understand how appellants can contend that any grant of an option on the part of respondents which they did not know about could effect either parties' legal right to enforce the contract they had entered into. If appellants attempted exercise of the same option (Exhibit 3-P) had not been premature as the result of this party being mistaken as to the date of the contract which incorporated this right, or if it had occurred after May 7, 1959, could respondents have contended successfully that this election had been vitiated by reason of the possibility that the undisclosed option might ripen into a contract favorable to both? If extrinsic events, favorable, or unfavorable, can so radically alter the terms of written agreements between parties dealing at arms length with respect to the subject matter of their agreement, what shall become of the sanctity of contracts?

POINT 3

PLAINTIFFS FORFEITED THEIR INTEREST IN THE CONTRACT OF MAY 7, 1958, BY FAILING TO MAKE THE PAYMENT DUE THEREUNDER ON OCTOBER 1, 1958, OR WITHIN THE 30-DAY GRACE PERIOD THEREAFTER.

There is no dispute in the evidence that appellants were obligated to pay the sum of $1,500.00 to Vern and Kenneth Mills on October 1, 1958, or within 30 days thereafter (Exhibit 7-P). Appellant Veigh Cumming's testimony is to the effect that it was only after the receipt of Mr. Marshall's letter of November 19, 1958 (Exhibit 2-P), that he made a tender of the $1,500.00 to Mr. England that he was required to pay on the contract (R. 115). The lower court excused this default on the ground that after Mr. Marshall's earlier letter, in which he advised that respondents were buying out appellants, there could be no forfeiture. Certainly, if appellants had ruled upon this earlier letter, it would be unconscionable to permit this, but there is no evidence in the record anywhere that this was the case. Appellants, in their brief (page 7), now take the position that since the court subsequently found that they ultimately were entitled to $1,754.11 as a result of expenditures by appellants for their joint operations, the payment due on October 1, 1958 need not have been made.

Even if one party's failure to abide by one section of a contract could relieve the other party of the sanctions set forth by the agreement for a violation of a different provision, it can readily been seen from Finding of Fact No. 7 of the Court (R. 34, 35) that $1,771.07 of the expenses of which one half are chargeable to the respondents were paid after October 1, 1958, so appellants could not under any theory be excused from paying some part of the payment due that date.

It is respectfully submitted that respondents effectively acquired all of the interests of appellants by exercise of their option as found by the trial court or through forfeiture of their interest by reason of the non-payment of the installment due October 1, 1958.

CONCLUSION

The Court should affirm the judgment of the trial court and award respondents their costs of court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney for Defendants and Respondents